No. 2851

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MENASHA WOODEN WARE COMPANY, a corporation
Plaintiff in Error

vs.

SOUTHERN OREGON COMPANY, a corporation; COOS COUNTY; ROBERT R. WATSON, County Clerk of Coos County; A. JOHNSON, Jr., Sheriff of Coos County, and T. M. DIMMICK, Treasurer of Coos County, Oregon; and the FIRST NATIONAL BANK OF COOS BAY,
Defendants in Error

BRIEF ON BEHALF OF DEFENDANT IN ERROR FIRST NATIONAL BANK OF COOS BAY

Upon Writ of Error
to the District Court of the United States for the District of Oregon

Dolph, Mallory, Simon & Gearin,
Mohawk Building, Portland,
Oregon, Attorneys for Plaintiff in Error.

W. U. Douglas, Marshfield, Oregon.
Attorney for First National Bank of Coos Bay.
L. A. Liljeqvist, Marshfield, Oregon.
Attorney for Coos County, et al.

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This defendant, the First National Bank of Coos Bay, is brought into this case because it is the depository of the funds in question. It cannot let go of the money without being liable upon its bond to the Treasurer of Coos County. It has no interest in the outcome of the matter, but stands ready to pay the money to whomever is legally entitled to it, yet it is placed in the same category as the proverbial, innocent by-stander, and a verdict against it in this case will subject it to an award of 6 per cent interest in plaintiff's favor.

This defendant has no desire to discuss the authority cited by plaintiff as to the form of the action. The only contention this defendant raises on that subject is that plaintiff has plead facts which show that this action will not lie because it shows that the money or property sought to be recovered is in the custody and under the control of another court, the Circuit Court of the State of Oregon for Coos County, and not under the control of these defendants.

This form of action is very simple, and the allegations to sustain it can be very meager; but the plaintiff has seen fit to state in connection with and as explanatory of it, a part of the real facts surrounding the transaction. To this complaint this defendant has interposed a demurrer, in substance as follows:

1. That the Court has no jurisdiction.

2. That there is a defect of parties defendant because the Circuit Court of the State of Oregon for Coos County, nor the Judges thereof, or any of them, are made parties.

3. That the complaint does not state facts sufficient to constitute a cause of action.

4. That it appears from the complaint that the money sought to be recovered is held by this defendant as a depository for the County Treasurer subject to the orders, control and jurisdiction of the Circuit Court of the State of Oregon for Coos County.

This demurrer in reality raises but one issue. Is the money sought to be recovered, in custodia legis? That is the issue upon which all the demurrers were decided in the lower court, and is the only question to be presented at this time.

The plaintiff refers to a claim that there were two causes of action embraced in the complaint. No such contention was made with reference to the present amended complaint, but it was claimed that the original complaint, prior to the time it was amended by interlineation to overcome that objection, did seem to refer to two causes of action.

In fact, a very full and complete discussion of the original case instituted by the Southern Oregon Company in the Circuit Court of the State of Oregon for Coos County was indulged in at the trial in the lower court, and the original complaint contained

much more of the pleadings of that case, but even after paring the original complaint, the present amended complaint sets forth enough so that the issue is not changed.

By referring to the order made by the Circuit Court of the State of Oregon for Coos County, as plead in the complaint, and shown at page 9 of the transcript, it will be seen that it authorizes the payment of the money into the cusody of the Court and directs the Clerk of the Court to hold and retain said money until the fiinal determination of the case of the United States of America vs. Southern Oregon Company, pending in the Circuit Court of the United States, for the District of Oregon. Of course there is also something said about tax receipts, but the portion of the order referring to the money is what governs the holding or disposing of it.

The plaintiff does not plead or show that the case of the United States of America vs. Southern Oregon Company has been decided, but does show that upon a trial of the demurrer interposed by one of the defendants in the case of Southern Oregon Company against Coos County, the demurrer was sustained, and an order of dismissal was made in the Circuit Court of the State of Oregon, which was affirmed by the Supreme Court of the State of Oregon. The order of dismissal does not show any order changing the former order of the Court with regard to the disposition to be made of this money. Plaintiff's brief claims that the case begun by the South-

ern Oregon Company against Coos County, et al. has been finally disposed of. However, this defendant would earnestly call the court's attention to the fact that nowhere in the plaintiff's complaint is there an allegation of that character.

Plaintiff's assignor, the Southern Oregon Company, exercised its right of appeal, and during the argument on the demurrer in the lower Court it developed, and was conceded at that time, that the said case of the Southern Oregon Company vs. Coos County was then on appeal to the United States Supreme Court. This was the condition of the record.

Plaintiff rightly contends that this form of action is an equitable action; and the maxims of equity necessarily apply, (27 Cyc p. 849) but they must be applied to all parties in the suit. It must come with clean hands and good conscience, and do equity before it can receive relief. But its assignor paid this money into Court voluntarily upon the order of the Court reciting that it should be held by the Clerk until the case of the United States vs. the Southern Oregon Company should be decided. Whether, therefore, the case of the Southern Oregon Company vs. Coos County, under which this money was paid in has been finally terminated or not, yet until that particular Court makes some different order this plaintiff is not entitled to the relief asked for from another court. It does not show any attempt on its part or on the part of its assignor to obtain an order from that Court refunding the money, but on the

contrary its complaint shows that it has arbitrarily made demand upon the custodians of the fund and thereupon brought this action. With this state of facts in view, and the liability of this defendant to the Circuit Court of the State of Oregon for Coos County, for these funds, can it be said that this plaintiff comes into court with clean hands and good conscience, when, if successful, could result in this defendant being required to pay the sum of $93,309.17 twice?

The complaint alleges that the plaintiff's assignor, Southern Oregon Company, delivered to the County Clerk of Coos County, Oregon, a check for $75,,000.-00, to comply with the order of the State court heretofore referred to, and also that later the said Southern Oregon Company delivered to the Clerk of the Court of Coos County, Oregon, a check for $18,309.17 for the purpose of complying with said order of the court.

The County Clerk and the Clerk of the Circuit Court of the State of Oregon, for Coos County, is the same identical official and person (See Constitution of Oregon, Art. II, par. 15.)

It was the duty of the custodian of these funds, upon receipt of the checks, to cash them. They were delivered for the purpose of paying so much money into Court, and when the Clerk accepted them, that implied an undertaking on his part to use diligence in presenting them for payment.

30 Cyc 1209

"Where the treasurer received the certificate of deposit under the terms of the judgment of the Court, he could only receive the same as money, and it was his plain duty to have reduced the money, certified to be payable upon presentation of certificate, to his possession, and to have safely kept the the same until disbursed under authority of law."

Agoure vs. Peck et al., (Colo.) 121 Pac. 706.

The first check was delivered to the Clerk prior to 1913, at which time the legislature of the State of Oregon passed an act which required that County Clerks of the different counties holding in their possession or custody public funds, or money in trust for any persons, by virtue of their office, or any money held in custodia legis, should pay the same over to the County Treasurer, and also providing that the County Treasurer shall keep the money on deposit with certain banks therein described as County depositories.

Oregon Laws 1913, page 515.

The complaint shows that the County Clerk did endorse and assign the checks to the County Treasurer, and that he did assign the same to the First National Bank of Coos Bay, and that they were

paid; and it also alleges, upon information and belief, that the First National Bank has credited said sums to the said defendant T. M. Dimmick as County Treasurer. The possession of the Clerk, the Treasurer, and the Bank then was the possession of the Court, in compliance with the statute of the Oregon Laws of 1913 at page 515.

Defendant claims that the complaint shows when this money was paid into Court it became custodia legis, and is so at the present time.

true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

Covell vs. Heyman 111 U. S. R. 182-183.

"When the Clerk receives a fund in his official capacity, his possession is that of the Court, and the Court has an inherent right to control such funds."

"Usually the Clerk has no power, without an order of the Court to make any transfer or alteration in the disposition of such fund or pay it out of Court."

7 CYC p. 225.

Bowden vs. Schotzell, S. Carolina. 23 A. M. Dec. 170.

Martin vs. Shannonhouse, 203 Fed. 517.

Shelton vs. Walthousen, 80 Conn. 599. 69 A. 1030.

Green vs. Ward, 1 Barb, 21.

Fidelity vs. Rankin, 124 Pacific Rep. 71.

"The Court in which the fund is deposited has exclusive jurisdiction of the question of the right to the money, and all claims against the deposit must be asserted there."

Gregory vs. Merchants National Bank et al, Mass. 50 N. E. 520.

Gregory vs. Boston Safety Deposit Trust Co. 144 U. S. 655.

Mariner vs. Ingraham, 255 Ill. 108. 99 N. E. 351.

CYC 13 Vol. p. 1038.

Wayman vs. Southard, 10 Wheaton U. S. I,

Clarke vs. Shaw, 28 Fed. 356.

In re Forysth, 78 Fed. 296.

Corbitt vs. Farmers Bank of Del., 114 Fed. 602.

D. B. Martin Co., vs. Shannonhouse, 203 Fed. 517.

So that the deposit into Court shall be completed the money must be delivered pursuant to an order of the court, otherwise the delivery will have no legal effect.

13 CYC 1036.

Brown vs. People, 3 Colo. 115.

Harris vs. Inst. 137 N. Y. Sup. 234.

In this case the order was made directing the Clerk to receive the money and hold it for a period

of time to be fixed by the determination of the other litigation.

"The money was paid into Court under order of the Court, and was held by the Court custodia legis. Whether the order under which it was paid was properly made, cannot be determined upon a proceeding in another Court. The Court by virtue of the pending suit in equity had jurisdiction of the subject matter and the parties. No other Court has jurisdiction of any question pertaining to the disposition of the money which is held by that Court. Claims upon the money are to be made in that Court and to be heard and determined there— * * * Any other doctrine would be at variance with the right of control of its own business, which inheres to a Court of Justice, and would cause uncertainty and confusion in the determination of legal rights."

Gregory vs. Merchants National Bank et al, Mass. 50 N. E. 520.

Citing

Tuck vs. Manning, 150 Mass. 211, 22 N. E. 1001.

Book Co., vs. De Golier 115 Mass. 67.

Tifft Weller vs. Sternberger, 5 L. R. A. 221, 40 Fed. 3-4.

Senior vs. Pierce, 31 Fed. 625-629.

Covell vs. Hayman, III U.S. 176.

No other court has any power or jurisdiction to disturb these funds so long as the Circuit Court of the State of Oregon for Coos County exercises any jurisdiction over it. That it still continues to exercise jurisdiction is established by the fact that it has never revoked, changed or amended the original order under which it was received.

"The power and duty of a Court to decide for itself whether property in its possession or under its control, cannot be taken from it by process issuing from another Court, is essential to its rights and duty to administer to its suitors such remedy as, according to law, they may be entitled, and to enforce its judgments."

D. B. Martin Co. vs. Shanonhouse, 203 Fed. 517.

"The Courts generally hold that to permit funds in their possession, to be subject to attachment, would be contrary to public policy."

D. B. Martin Co. vs. Shanonhousen, 203 Fed. 517.

Citing Clarke vs. Shaw, 28 Fed. 356, and In re Forsyth, 78 Fed. 296.

"A fund custodia legis and under the control and subject to the order and decrees of Chancery Courts, cannot be paid out by the Clerk and

Master, to any one, except in obedience to the order of that Court, and a party cannot resort to a different forum and recover of the Clerk and Master of the Chancery Court and his sureties, the money and thus oust the Chancery Court of its jurisdiction."

Craig et al vs. The Governor for the use of White, 43 Tenn. 244.

Assuming doubt for argumentative purposes only, as to whether or no this court has a right to interfere with funds in the posssession of the State Court and over which it assumes jurisdiction, the pleadings in this case establish the fact that these funds are not in the control of these defendants, but under the control and in the posession of the State Court. How then can the plaintiff maintain this action, without making the State Court or its Judges parties?

"The money claimed in this case was deposited by the Circuit Court of the United States, and is to be held by the defendant bank subject to withdrawal only upon the order of one of the judges of that Court. It is quite clear that no proper inquiry could be had in regard to the ownership of the fund without making the judges of the Court parties. But the objec-

tion lies deeper than this. The money was paid into Court under the order of the Court and was held by the Court custodia legis."

Gregory vs. Merchants National Bank et al. Mass. 50 N. E. 520.

There are so many various classes of process, proceedings or means under and by which property and money become custodia legis, that naturally the decisions are not all controlled by any one rule but only the facts and statutes governing each individual case, as to when the property ceases to become custodia legis. For instance, numerous decisions can be found to the effect that where a Sheriff has on execution or attachment, satisfied the execution out of the attached property the surplus is then ammenable to the process of other courts. The reason for this is clearly that the court only took posession and control of sufficient property or funds to satisfy its mandates, and when the amount is realized it has no jurisdiction or control of the balance. Again, attached property ceases to become custodia legis when the original action is dismissed because, as a matter of statute, the attachment is dissolved and by its dismissal the officer of the Court has no further power or authority to retain the property in his possession.

There are many decisions on the question of custodia legis, but one thing is certain that so long as

the property is in the actual or constructive custody of a Court, and it appears to be exercising any jurisdiction whatever therein, that possession will not be disturbed by any other Court.

The diversity of opinions upon the question of when the custody of the court ceases are explained solely by the fact of the different circumstances and statutes governing each particular case. Of the numerous cases cited by the plaintiff to support its contention that the State Court has lost control of this $93,309.17, there does not seem to be any case which applies.

The citation of Moran vs. Sturges, 154 U.S. 256, giving a quotation from Buck vs. Colbath, 3 Wallace 334, comes nearer to matching the shade of reasoning which plaintiff seeks to apply than any other citation given by it, but even assuming that the language in the quotation is not dicta and was used as a part of the reasoning adopted by the Court in arriving at its decision in that case, the effect which plaintiff's theory demands for it cannot be conceded. The pertinent part of the quotation is as follows:

> "It is only while the property is in possession of the Court, either actually or constructively, that the court is bound or proposes to protect the possession from the process of other courts. Whenever the litigation is ended or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to

the rights of the parties before them, whether those rights require them to take possession of the property or not."

But in this instance the Circuit Court of the State of Oregon, for Coos County, still actually has possession of this money. The order recites that this money shall be held by the Clerk until another case entirely separate from the one under which it was deposited in Court, shall be decided. Whether the Court had a right to make such order is not for plaintiff to question, because pursuant to that order plaintiff's assignor voluntarily placed this money in the court's custody.

As to whether the funds cease to be in custodia legis whenever the litigation is ended, that quotation must be accepted with some qualification. In many instances it may be true, but can it be said to be a general rule?

"The Court in which a fund has been deposited has power to order distribution of it, and when jurisdiction is once obtained it is not lost, either by the abatement of the suit of dismissal of the bill. After the fund is distributed that Court has no further jurisdiction over it in the absence of fraud. The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the money, and all

claims against the deposit must be asserted there."

13 CYC 1038.
Davis vs. Watkins, 3 Bush Ky. 224.
Reinhold vs. Hansson, 169 Ill. Ap. 334.
Priestly vs. Hillard & Taber, 187 Fed. 784.
Gregory vs. Merchants' Nat. Bank, 171 Mass. 67.
Gregory vs. Boston Safety Deposit, 144 U.S. 67. 50 N. E. 520.

The defendant claims the fund to be custodia legis, and while "custodia legis" is a general term and covers many different means of the acquisition and holding of property by the Court or court officer, yet in this particular instance the money involved was directed to be paid in Court to the Clerk and held by him for a definite time which has not yet expired, and it was so paid.

This fund therefore is a DEPOSIT IN COURT and is governed by the rules concerning property acquired and held in the custody of the court in that particular manner.

The last quotation above given, 13th Cyc 1038, and the citations supporting the same, establish that when jurisdiction is once so obtained of a fund, it is not lost either by abatement of the suit or dismissal of the bill, but the court in which the fund is de-

posited has exclusive jurisdiction of the question of the right to the money, and all claims against the deposit must be asserted there.

That rule is decisive in this case because the statement of facts by the complaint shows that the money was deposited in the State Court upon an order of that court, and in addition shows the contents of the order itself. While it is true the complaint shows the order required the Sheriff or the defendant in that case to do certain things which were not done, in it were no qualifications, the money was not to be returned upon the doing or not doing of anything by the Sheriff or the other defendants in the case, but was to be held by the Court until the litigation between the United States of America and the Southern Oregon Company in the Federal Court was terminated.

Granting the possibility of some variation in the rule above cited as to deposits in court, yet there has been no modification of that order, nor is the litigation between the United States of America and the Southern Oregon Company alleged to have been terminated. How could it be possible for the State Court to lose jurisdiction over these funds without some modification of the order or the happening of that event?

That the State Court is continuing to exercise jurisdiction over the funds on deposit with it is apparent from the order itself. If the contingency had happened, or any modification of the order had been

made, such apparent exercise of jurisdiction as shown by the order would be nullified, but such is not the case, nor does the complaint allege it.

While the amount involved in this case is large, the principle underlying the whole question seems simple. Shall this Court be bound by the rule repeatedly adhered to in the decisions of the many State and Federal Courts, under and by which they have refused to interfere with the property under the control and jurisdiction of another court?

Respectfully submitted,

W. U. DOUGLAS,

Attorney for Defendant in error
First National Bank of Coos Bay.